No. 48779-9-II

COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

JAMES V. KAVE AND HOLLY M. KAVE,
individually and the marital community thereof,

Appellants,

v.

MCINTOSH RIDGE PRIMARY ROAD ASSOCIATION,
a Washington State Corporation,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent, McIntosh Ridge Primary Road Association ("McIntosh"), is essentially the homeowners' association for the McIntosh community in which Appellants, James and Holly Kave, bought real estate. McIntosh is governed by a Board of Directors pursuant to covenants. The covenants, which are titled Easements, Covenants and Restrictions ("EC&Rs"), were recorded prior to the Kaves purchasing into McIntosh.

The McIntosh EC&Rs established various easements throughout the community, including two easements that burden real estate purchased by the Kaves. The two community easements that burden the Kaves' property and are at issue in this case have been referred to as: (1) the Recreation Easement; and (2) Trail Easement No. 1. The Kaves were on notice of the easements when they purchased their property by virtue of having notice of the legal documents creating the easement and by physical observation.

Evidence presented at trial proved that the Kaves discouraged other members of McIntosh from using community easements. The Kaves refused to cooperate in trail maintenance (*e.g.*, allowing McIntosh to clear timber that had fallen across the trail), engaged in activities that damaged the trail (*e.g.*, driving heavy machinery over the trail), put up "No Trespassing" signs near the trail entrance, and removed amenities from the

recreation area (*e.g.*, picnic tables and picnic shelter). Evidence was presented at trial that the Kaves' conduct was intended to stop people from using the easements so the Kaves could have exclusive use of the land encumbered by the easements. The Kaves had the attitude that it was their land and they could do whatever they wanted whenever they wanted despite the fact there were community easements and EC&Rs affecting the land.

In an apparent attempt to further their goals of keeping McIntosh members away from the easements, the Kaves engaged wetlands experts to analyze the Kaves' property and to determine there was a wetland within a portion of the Recreation Easement. A wetland was declared on the Kaves' property over a portion of the Recreation Easement. McIntosh thereafter paid to fence off the wetland and return that portion of land to its natural state—*i.e.*, its condition prior to any work having been done to improve that area for community use. Notably, the wetland portion of the Recreation Easement is across a road from where the Kaves damaged trails, destroyed and removed property, put up no trespassing signs, etc.

The Kaves initiated the lawsuit based generally on the argument that McIntosh should reimburse them for fees the Kaves spent on experts to analyze potential wetlands issues on portions of the Kaves' property burdened by easements. The Kaves' claims were dismissed prior to trial.

McIntosh asserted counterclaims seeking to quiet title to easement areas, to expand the Recreation Easement area based on an implied use theory, and for damages caused by the Kaves' activities. McIntosh's counterclaims included claims for intentional trespass and damage pursuant to RCW 4.24.630, nuisance, conversion, unjust enrichment, breach of EC&Rs, quiet title and implied easement. McIntosh prevailed at the Trial Court level, having succeeded on all claims except for implied easement and unjust enrichment. McIntosh was awarded damages by the jury. McIntosh was also awarded fees pursuant to RCW 4.24.630 and the EC&Rs. McIntosh requests that the Orders and rulings of the Trial Court be affirmed.

II. STATEMENT OF THE CASE

A. Creation of McIntosh and establishment of relevant easements.

The McIntosh Ridge community was created by the Weyerhaeuser Real Estate Development Co. in 1999 and modified by a new survey recorded in 2000. Weyerhaeuser recorded EC&Rs on October 5, 2000, which is an encumbrance on all lots in McIntosh Ridge. *See,* CP 35-51, 235-238, and 1347-1394.

Weyerhaeuser developed McIntosh Ridge with a variety of amenities. In 2001, Weyerhaeuser created community recreation

easements, for the benefit of McIntosh, "for general community uses including, but not limited to, parking, recreating and picnicking. One community recreation easement (*i.e.,* the Recreation Easement) includes a portion of Lot 12, which is now owned by the Kaves. *See,* CP 35-51, 235-238, 1296-1297, and 1396-1405.

In 2002, Weyerhaeuser created trail easements for the benefit of McIntosh, for trails "lying 5 feet on each side of the centerline of the trail as built and located on the ground." CP 1299-1300.

In 2004, the Kaves purchased two lots within McIntosh Ridge from Weyerhaeuser—Lot 12 and Lot 18A. The deed provided by Weyerhaeuser stated the Kaves accepted the property "AS IS" and "WHERE IS." *See,* CP 35-51 and 235-238.

1. Recreation Easement and amenities.

The Recreation Easement overlays a portion of the Kaves' Lot 12. CP 1296-1297. The Kaves were aware of this easement and the existence of amenities (*e.g.,* picnic shelter) belonging to the easement when they purchased Lot 12. *See,* CP 1322-1339. These amenities had been marketed by Weyerhaeuser to potential buyers as community recreation facilities—the Recreation Easement was ready for use in 2003, which was before the Kaves purchased Lot 12. CP 1396-1405 and 1419-1442. The Recreation

Easement was well maintained and included a picnic shelter, fire pit, flag pole, hitching posts, log benches, and picnic tables. *See,* CP 1431. Some of the amenities were placed by Weyerhaeuser outside the legally described boundaries of that easement. CP 1396-1405; Ex. 17; and VRP 256:4-8, 84:23 – 85:5, 150:4-14, and 166:6 – 167:2. Hitching posts were outside the easement, for example. *Id.* The picnic shelter straddled the easement. *Id.*

The Recreation Easement has community roads running through it that intersect to create a triangle-shaped portion of land between the roads. The picnic shelter, fire pit, and other amenities were positioned on the northeast side of the roads, outside of the triangle. *See,* CP 1296-1297 and Ex. 17. It has been determined that a portion of the triangular area between the roads is a wetland. *See,* CP 1443-1474. The boundaries of the wetland have been fenced pursuant to a Restoration Plan approved by the Washington State Department of Ecology. *Id.*

2. Trail Easement No. 1.

There is also no dispute that Trail Easement No. 1 was created for the use and enjoyment of the McIntosh community. Trail Easement No. 1 overlays a portion of the Kaves' Lot 12 and runs in a semi-circle behind the Recreation Easement. Trail Easement No. 1 also runs along the east border of Kaves' Lot 12 until it turns west and connects back to the road. The trial

is described and depicted on legal documents as a ten-foot-wide path contained within a fifty-foot-wide corridor. Trail Easement No. 1 provides scenic views of a local beaver pond, and allows McIntosh community members to enjoy a pleasant walk in the woods. *See,* CP 1299-1300; and VRP 80:5 – 81:15 and 105:8-17.

The ten-foot-wide trail may have shifted over the years, but the path appears to remain within the fifty-foot-wide corridor. *See,* CP 1947.

B. The Kaves' systematic destruction/disruption of easements.

When the Kaves purchased their land within McIntosh, the land was burdened by easements. CP 1296-1300. Consistent with those easements, Weyerhaeuser had created for McIntosh a beautiful recreation area with amenities and a trail, which were for community use. CP 1396-1405 and 1419-1442. But the Kaves wanted to build a shop for their exclusive, personal use on and/or near the easements. VRP 371:20 – 373:6. The Kaves started removing amenities, which culminated in their removal of a community picnic shelter. VRP 173:5 – 174:15 and 94:19 – 95:21. The Kaves put "No Trespassing" signs up in the area of the easements. VRP 348:3-19. And when Trail Easement No. 1 was blocked by fallen trees, the Kaves did everything they could to prevent McIntosh from clearing the trail. VRP 105:23 – 108:15; and CP 1435-1442. The Kaves also conducted

logging activities in the vicinity of the easements, which resulted in the Kaves parking equipment and discarding debris in unsightly areas near the easements. VRP 108:16 – 109:3. Further, the Kaves' activities damaged the trail and recreation amenities. VRP 109:4-19.

The Kaves' attitude toward the easements is best summed up by the portion of Mr. Kave's deposition that was read to the jury. Mr. Kave testified that, in his opinion, McIntosh had to coordinate with him to maintain the portions of McIntosh's easements that burdened the Kaves' property. For example, Mr. Kave testified that if a fallen tree blocked the trail then McIntosh had to leave the trail blocked until Mr. Kave moved the tree on his own. Mr. Kave stated that community trails would be cleared, "in [his] discretion when [he] get[s] around to it." VRP 132:24 – 134:7.

C. Procedural Background.

1. The Kaves' Claims.

The Kaves alleged that McIntosh damaged wetlands on the Kaves' property when McIntosh performed maintenance work on the triangle-shaped portion of land between intersecting roads within the Recreation Easement. The Kaves alleged that McIntosh's work could have subjected the Kaves to wetlands violations. The Kaves went to great lengths to have the area in question qualified as a wetland; there is no evidence the area in

question had been declared a wetland in the past and/or was likely to ever be identified as such, but for the Kaves' insistence. The Kaves also alleged that McIntosh's work resulted in $522.00 worth of damage to timber. The Kaves brought claims against McIntosh for violations of dozens of sections of the EC&Rs and various local, state, and federal laws. CP 16-34.

2. McIntosh's Counterclaims.

McIntosh had a few goals in mind when filing counterclaims: (1)(a) establish/confirm the size and location of the Recreation Easement given that some of the recreation amenities had been placed outside of the legally described boundary; (1)(b) establish/confirm the location of Trail Easement No. 1 given that the path may have shifted over time given certain impediments (*e.g.,* destruction caused by the Kaves' operation of heavy machinery on trails, trees blocking path, etc.); and (2) recover damages. McIntosh's counterclaims included claims for quiet title and implied easements, breach of EC&Rs, nuisance, conversion, unjust enrichment, and damages pursuant to RCW 4.24.630. CP 35-51.

3. Dispositive Motions.

McIntosh brought three dispositive motions during the course of litigation requesting the dismissal of the Kaves' claims. CP 257-276, 710-727, and 1500-1516. McIntosh's dispositive motions were granted and the

Kaves' claims were dismissed. CP 587-590, 1255-1261, and 1911-1914. However, the Trial Court indicated the Kaves possibly had timber trespass damages (CP 1911-1914) even though the Kaves admitted that McIntosh did not cut down trees, "but only removed storm damaged trees or downed trees and all the timber was provided to Mr. Kave..." (*See,* CP 45 and 237). Consistent with its dismissal of the Kaves' claims, including for timber trespass, the Trial Court eventually entered an Order prohibiting the Kaves from arguing timber trespass damages to the jury. CP 2290-2291.

The Kaves brought a motion for summary judgment on McIntosh's counterclaims. CP 1659-1666. McIntosh simultaneously moved for summary judgment on the counterclaims. CP 1475-1499. In response to McIntosh's motion, the Kaves argued there were issues of fact precluding summary judgment. CP 1691-1695. The Court, therefore, denied the Kaves' dispositive motion. CP 2113. The Court also denied McIntosh's dispositive motion except as to: (1) McIntosh's request for quiet title in the location of Trail Easement No. 1; and (2) McIntosh's ownership of amenities meant for the Recreation Easement. CP 1915-1918.

4. Trial.

a. Motions in Limine.

The Trial Court ruled the Kaves would not be permitted to present evidence to the jury related to the Kaves' alleged damages for claims that had been dismissed. There was no legal basis to support an award to the Kaves and the evidence of alleged damages was not relevant to the issues remaining for trial (*i.e.,* McIntosh's counterclaims). The Trial Court specifically ruled that the Kaves' timber trespass claims were dismissed in full. The Trial Court had previously contemplated the possibility of a small amount of timber damages, but had deferred ruling and decided to rule prior to trial that the Kaves had no legal basis to go forward with the prosecution of any claims. CP 2016-2030, 2248-2254, 2278-2284, and 2290-2291.

b. Stipulation that EC&Rs allow McIntosh fees.

McIntosh's Counterclaims alleged the Kaves violated distinct provisions of the EC&Rs. CP 35-51; VRP 541:22 – 542:5. McIntosh requested attorneys' fees pursuant to the EC&Rs. CP 50. The Kaves denied McIntosh's counterclaim alleging that the Kaves breached EC&Rs, and the Kaves requested an award of attorney fees. CP 235-238.

At the time of trial, the parties each reiterated to the Court their understanding that McIntosh's counterclaim for breach of EC&Rs was a

basis to award attorneys' fees—*i.e.*, either the Kaves or McIntosh would be awarded attorneys' fees depending on the jury's findings, but it was agreed that one of the parties would be entitled to attorneys' fees. VRP 8:10 – 12:14. McIntosh proposed a Special Verdict Form, which asked in pertinent part, "Do you find that the Kaves beached the Declaration of Easements, Covenants, and Restrictions ('EC&Rs') that applies to McIntosh, the Kaves' property, and the easements burdening the Kaves' property?" CP 2543. The Kaves did not propose a verdict form or make any exceptions to the question the jury was asked regarding the Kaves' breach of EC&Rs. VRP 490:18-22 and 523:11–527:7. In addition to not making any exceptions to the instructions proposed by McIntosh related to the breach of EC&Rs counterclaim, the Kaves did not even attempt to propose jury instructions related to that counterclaim. CP 1999-2015; and VRP 398:15–417:4 and 516:10–518:19.

The jury found that the Kaves breached the EC&Rs. CP 2543. Consistent with the parties' representations, the Court thereafter found, "[t]he Kaves have acknowledged that the EC&Rs has a fee provision." CP 3083. Based on the agreement of the parties that fees should be awarded to the prevailing party pursuant to the EC&Rs, the Court concluded, "[t]he jury's findings that the Kaves breached the EC&Rs…gives rise to an award

of attorneys' fees." CP 3085.

c. Jury Instructions.

The Kaves submitted jury instructions as if their claims were pending and ignored the fact their claims had been dismissed. CP1999-2015. McIntosh proposed jury instructions on its counterclaims. *See,* CP 2168-2192 and 2255-2277. The Kaves did not effectively propose instructions that were alternatives to the instructions proposed by McIntosh on McIntosh's counterclaims. *See,* CP 2168-2192 and 1999-2015. The Kaves specifically failed to propose any instruction as to their statute of limitations affirmative defense, and they failed to propose any instruction suggesting that a forest practices exemption might apply to this case. CP 1999-2015. With respect to the statute of limitations instruction, the Kaves chose not to propose a written instruction despite the Trial Court requesting that the Kaves submit such an instruction for consideration. *See,* VRP 409:10-15, 510:21–513:4, and 528:7–530:4.

d. Jury Verdict.

The jury found in favor of McIntosh on intentional waste and damages, conversion, nuisance, and breach of EC&Rs. The jury awarded a total of $13,500.00 for intentional waste and damages claims pursuant to RCW 4.24.630 and $10,500.00 on other claims. McIntosh did not prevail

on implied easement or unjust enrichment. CP 2540-2543.

5. Post-Trial Motions for Fees and Judgment.

McIntosh moved for an award of costs and fees pursuant to RCW 4.24.630 and the EC&Rs. CP 2570-2580. As previously mentioned, the parties had agreed that the EC&Rs provided one basis upon which to award fees. VRP 8:10–12:14. Even the Kaves moved for an award of fees pursuant to the EC&Rs (CP 3011-3013), although it was unclear how the Kaves could have conceivably considered themselves the prevailing party (CP 3064-3068). The Court denied the Kaves' Motion for Fees. CP 3079-3081. The Court granted McIntosh's Motion for Fees. CP 3082-3087.

The Court also trebled certain damages awarded pursuant to RCW 4.24.630. The resulting judgment entered against the Kaves totaled $352,293.91, including fees. CP 3082-3087.

6. Appeal.

The Kaves filed a sixty-one page Notice of Appeal identifying eleven Orders, four jury instructions, the Special Verdict Form, and the Judgment entered against the Kaves. Notice of Appeal. The Kaves requested over 140 documents to be included in the Clerk's Papers, several trial exhibits, and the trial transcript. CP 1-15.

The Kaves' assignments of error in Appellants' Opening Brief questions only two Orders and touches on only a fraction of the documents the Kaves included in the record on review. And most of the Kaves' arguments on appeal have to do with issues that were not preserved for appeal (*e.g.*, jury instructions that were not proposed and/or not objected to).

III. SUMMARY OF ARGUMENT

Appellants' Opening Brief attempts to argue numerous issues that were not preserved for appeal. For example, the Kaves now argue that EC&Rs do not provide a basis to award attorneys' fees even though the Kaves previously agreed that fees should be awarded to the party prevailing on McIntosh's Breach of EC&Rs counterclaim. Other examples include the Kaves' multiple attempts to make new arguments about jury instructions, to which the Kaves failed to take exception and for which the Kaves failed to propose alternate language. The Court should decline to review the issues that the Kaves are raising for the first time on appeal.

The evidence and applicable law do not support the Kaves' arguments; including with respect to the issues for which the Kaves failed to preserve an appeal. The law cannot be read to encourage property owners to intentionally remove and destroy personal property within an easement

and block access through an easement in a deliberate effort to interfere with the use of community easements. The Kaves' wrongful and oppressive actions, for which the jury determined they should be held accountable, are all related to the Kaves' desire to scare their neighbors from using community easements so that the Kaves could maneuver a way to build a shop for their private use in or near community easements.

Finally, McIntosh is entitled to recover attorneys' fees on appeal pursuant to RAP 18.1, RCW 4.24.630, and Section 8.10 of the EC&Rs. The Kaves initiated an ill-conceived lawsuit in an attempt to further their goal of discouraging McIntosh members from using community easements. McIntosh responded by filing counterclaims, which a jury determined were supported by the evidence presented at trial. The jury specifically found that the Kaves violated EC&Rs. The jury also found the Kaves acted wrongfully and caused damages in violation of RCW 4.24.630. The Trial Court awarded fees, and it is appropriate for fees to be awarded on appeal.

IV. ARGUMENT

A. A different standard of review applies to the different issues.

The Kaves' assignments of error deal with two summary judgment Orders (Order quieting title on the trail easement and Order denying summary judgment on RCW 4.24.630 counterclaim), one Order on a

motion in limine, part of the Order denying the Kaves' CR 50 Motion, a few decisions on jury instructions, and the Order awarding McIntosh fees. Some issues are subject to *de novo* review and others discretionary review.

1. Trail Easement Summary Judgment Motion.

Ordinarily, trial court rulings made in conjunction with a dispositive motion are reviewed using the *de novo* standard of review. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 214-15, 242 P.3d 1 (Div. 1 2010) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). However, decisions made in equity are of a discretionary nature and, "[b]ecause the trial court has broad discretionary authority to fashion equitable remedies, [appellate courts] review such remedies under the abuse of discretion standard." *Cornish College of the Arts*, 158 Wn. App. at 221 (citations omitted). "An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons." *Id.* At footnote 10 of its decision, the Court in *Cornish College of the Arts*, relying on *Crafts v. Pitts*, 161 Wn.2d 16, 29, 162 P.3d 382 (2007), indicated that equitable decisions made by trial courts in the context of summary judgment motions could be reviewed based on the abuse of discretion standard.

As explained in Section IV.B. below, there were no issues of fact bearing on the trail easement quiet title question. The Trial Court had broad authority to fashion an equitable remedy. The decision to confirm the trail in its current location should be reviewed for abuse of discretion.

2. RCW 4.24.630 Counterclaim—Summary Judgment Motion.

As stated above, summary judgment rulings are typically reviewed *de novo*. *Cornish College of the Arts, supra* (citing *Folsom, supra*). In other words, the appellate court "engage[s] in the same inquiry as the trial court." *Id.* Summary judgment is properly granted where it is demonstrated "that there is no genuine issue as to any material fact..." *Cornish College of the Arts*, 158 Wn. App. at 216 (citing CR 56(c)).

McIntosh agrees the Trial Court's denial of the Kaves' Motion for Summary Judgment on McIntosh's RCW 4.24.630 Counterclaim should be reviewed *de novo*. But as explained in Section IV.C. below, the Kaves admitted there were issues of material fact precluding summary judgment. The Kaves' Motion for Summary Judgment was properly denied in light of the Kaves' admission that there existed genuine issues of material fact.

3. RCW 4.24.630 Claim—Motion in Limine.

McIntosh's Motion in Limine to exclude the Kaves from presenting evidence of damages allegedly related to their RCW 4.24.630 claim was

based in large part on prior Orders on summary judgment that dismissed the Kaves' claims. The Kaves failed to assign error to any of the Orders dismissing their claims on summary judgment. The Kaves appear to concede that Orders dismissing their claims were proper in that the Kaves used those Orders as the framework for the Kaves' argument that the Trial Court erred in granting McIntosh's Motion in Limine excluding the Kaves from presenting evidence of damages. At all rates, the Kaves argue that the Court's decision with respect to the Motion in Limine should be reviewed for an abuse of discretion, and McIntosh agrees with that standard of review.

4. Statute of Limitations Defense and Jury Instruction.

The Kaves' arguments with respect to the statute of limitations touches on the Kaves' CR 50 Motion at the conclusion of McIntosh's case in chief and on the Trial Court's decision not to read a jury instruction on the statute of limitations. On the jury instruction issue, the Kaves failed to propose in writing any specific statute of limitations instruction. An appellate court should not consider an alleged error in failing to give an instruction if the party claiming error did not propose such an instruction. *See, State v. Strandy*, 49 Wn. App. 537, 745 P.2d 43 (Div. 2 1987); *Kemp v. Leonard*, 70 Wn.2d 643, 424 P.2d 660 (1967). And in such a case, the Trial Court's decision not to give an instruction should be reviewed for

abuse of discretion. *See, e.g., Tennant v. Roys*, 44 Wn. App. 305, 308-309, 722 P.2d 848 (Div. 1 1986). As to the Kaves' CR 50 Motion for Judgment as a Matter of Law, this Court should apply the *de novo* standard of review. *Gorman v. Pierce County*, 176 Wn. App. 63. 307 P.3d 795 (Div. 2 2013).

5. Nuisance Jury Instruction.

One of the big problems with the Kaves' requests for appellate review of various jury instructions is that there is nothing at the Trial Court level to review. *See, Bingisser v. English*, 1 Wn. App. 436, 462 P.2d 945 (Div. 1 1969); *State v. Scherer*, 77 Wn.2d 345, 462 P.2d 549 (1969); *State v. Scott*, 77 Wn.2d 246, 461 P.2d 338 (1969); *State v. Moore*, 77 Wn.2d 54, 459 P.2d 643 (1969); *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 451 P.2d 669 (1969). And since there is nothing to review, there is no standard of review. To the extent this is an issue, McIntosh argues the abuse of discretion standard should apply. *See, Tennant, supra.*

6. RCW 4.24.630 Jury Instruction.

See above Section IV.A.5.

7. Award of Fees.

The Trial Court's award of fees should be reviewed based on the abuse of discretion standard. A trial court's award for attorney fees may be reversed only on a showing of "manifest abuse" of discretion, namely, "if

the trial court exercised its discretion on untenable grounds for untenable reasons." *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 98, 231 P.3d 1211 (Div. 2 2010) (citing *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)).

B. The Trial Court did not abuse its discretion in quieting title to Trail Easement No. 1 in its current location.

There is no dispute the Kaves' property is burdened by a trail easement created by Weyerhaeuser, the previous owner of all of the land in the area, for the benefit of McIntosh. The trail easement, Trail Easement No. 1, is described in pertinent part as "a 10 foot wide easement...lying 5 feet on each side of the centerline of the trail as built and located on the ground and generally described below as: [legal description]...the sidelines extended or shortened to provide a full and continuous easement and as the trail is located on the ground and generally shown on Exhibit B." Exhibit B is a map depicting Trail Easement No. 1 as a "50' wide trail easement." Notes below the map indicate, "this drawing is to show the general location of the easement..." *See,* CP 1299-1300.

Evidence was presented to the Trial Court that Trail Easement No. 1 was used and enjoyed by members of the McIntosh community and that it was clearly marked at one time. But due in large part to the Kaves' threatening and obstructionist activities that deterred McIntosh at times

from maintaining the trail, the trail may have moved; either that or it was not originally constructed in exact conformance with the legal description. Either way, there was always a visible trail on the ground that was for the use of McIntosh members. *See,* CP 1419-1474.

Trail Easement No. 1 in its current location is still within the fifty-foot-wide corridor that the ten-foot-wide path is meant to pass through. *See,* CP 1947. The Trial Court's Order did not relocate the easement, but simply confirmed the easement did not have to be altered/moved—*i.e.*, "[McIntosh] may use the trail easement in its current location and should take steps to document the current location of the trail to the extent the trail has shifted from its original and/or the legally described path." CP 1916.

Trial courts have broad discretion to fashion an equitable remedy, and the Trial Court's decision in this case to leave the trail where it is was not a manifestly unreasonable decision. The decision is supported by a reasonable interpretation of the instrument granting McIntosh the easement—*i.e.*, that the document was meant to only generally describe the location of the trail and the trail was intended to be located within a fifty-foot-wide corridor as opposed to being forced into a specific ten-foot-wide path. It is natural that a trail in a forested area will vary some over time as vegetation and weather impact the terrain. In this case, for example, fallen

trees blown over by the wind and/or logged by Mr. Kave may have pushed the trail in a new direction. And Mr. Kave's logging activities that damaged the trail may have changed the course of the trail.

Regardless of why the trail may have moved some within the fifty-foot-wide corridor, there has always been a trail and the Kaves always knew their property was burdened by Trail Easement No. 1. CP 35-51 and 235-238. Further, there is no admissible evidence that McIntosh was responsible for moving the trail. The evidence properly and timely before the Trial Court was that if the trail moved, it was a natural occurrence and/or caused by the Kaves. Additionally, McIntosh's preferred remedy was not to relocate the trail—just the opposite, McIntosh requested to leave the trail where it is.

Contrary to the Kaves' assertions, a Superior Court Judge does have broad equitable powers to determine the location of an easement. In *Piotrowski v. Parks*, 39 Wn. App. 37, 691 P.2d 591 (Div. 2 1984), which is a case that McIntosh briefed for the Trial Court, the parties and/or their predecessors in interest erected a boundary line fence between two properties, but later found out the fence was not on the boundary line described on legal documents. CP 1486-1490. The Court in *Piotrowski* used its equitable powers to quiet title to disputed portions of property and

to leave the fence where it was based on the logic that the parties were on notice of where the boundary line was physically established. *Id.*

Piotrowski did not involve an easement, but it logically follows that if a court has equitable power to give and take land by acknowledging an existing fence that was mistakenly put in the wrong place, then the court also has power to confirm the location of an easement by acknowledging an existing trail that moved naturally and/or due to acts by the owner of the servient estate. It is not as if the Kaves lost any land—the ten-foot-wide path that burdens their land is simply in a different part of the fifty-foot-wide corridor than where the path might have originally been. The important common factor between *Piotrowski* and the current situation is that in both cases there is a clearly demarcated line on the ground and the parties have notice of the line. The Kaves knew and have known for years that there is supposed to be a trail on their land and that there is, in fact, a trail—it is reasonable to leave the trail where it is.

In another case, *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 999 P.2d 54 (Div. 3 2000), the Court held it is proper to reform a legal document granting an easement, to the extent it is deficient, provided the document was intended to accomplish a certain objective and the document did not execute that intention. The document creating Trail Easement No. 1 in this

case provides for a ten-foot-wide trail within a fifty-foot-wide corridor, and it appears the objective of the document to create a community trail easement was accomplished. But to the extent this is not the case because the trail's physical location is inconsistent with the legal description, *Wilhelm*, *supra*, confirms the courts have equitable powers to fashion a remedy.

The Kaves argue that the Trial Court lacked authority to fashion an equitable remedy because, they say, an easement cannot be relocated without the consent of all parties affected by the easement. The Kaves argue that they do not consent for the trail easement to be relocated. The cases the Kaves rely on, *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (Div. 1 2002), and *Crisp v. VanLaecken*, 130 Wn. App. 320, 122 P.3d 926 (Div. 2 2005), are distinguishable in a number of ways. In those cases, the owner of the servient estate was asking for permission to relocate an easement despite the objection of the dominant estate owner. Here, the servient estate owner is the party objecting. Further, there is no request to relocate—only a request to confirm the location of the easement where it currently exists, which is within the fifty-foot-wide corridor set forth in the document that created the easement.

The Kaves argue that courts should attempt to preserve "uniformity, stability, predictability, and property rights." Appellants' Opening Brief at 20–21 (citing *Crisp*, 130 Wn. App. at 325). But the Kaves fail to consider that preserving uniformity, stability, etc., would be best served by leaving the trail exactly where it is as opposed to moving it at this time.

C. McIntosh's 4.24.630 claim was properly left to the jury.

The Kaves' Motion for Summary Judgment to dismiss McIntosh's RCW 4.24.630 claim was argued at the same time as McIntosh's Cross-Motion for Summary Judgment to find in favor of that same claim. *See,* CP 2063-2128. And although the Kaves had initially asked for summary judgment, they later argued to the Trial Court that issues of fact precluded the Trial Court from granting summary judgment. *See,* CP 1696-1700. The Trial Court denied the Kaves' Motion for Summary Judgment and, in doing so, the Trial Court stated, "counsel for [the Kaves] concedes that there are questions of fact." CP 2113. The Kaves should not be permitted to argue on appeal that the Trial Court's decision was in error when the Trial Court's decision was based at least in part on the Kaves' concession that there were issues of fact. *Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (Div. 2 2008) (holding that genuine issue of material fact existed as to whether certain documents were public records, which issue of fact made

summary judgment improper); *Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (Div. 2 2008) ("Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."). The Kaves conceded there were issues of fact so that McIntosh's motion would be denied and the issue could be decided by the jury at trial. The Kaves' request for this Court to reverse the Trial Court's denial of the Kaves' Motion for Summary Judgment is the first of many requests made by the Kaves on appeal that are inconsistent with positions argued to the Trial Court and/or are issues for which the Kaves failed to preserve an appeal.

To the extent the Court considers the Kaves' argument on appeal regarding McIntosh's RCW 4.24.630 counterclaim, the starting point for such analysis is McIntosh's Counterclaims filed on September 17, 2013—in which pleading McIntosh outlined how its claim for RCW 4.24.630 damages applied to two separate easements: (1) "damage to and removal of [McIntosh]'s Improvements from the Improved Recreation Easement and surrounding area"; and (2) "damage to [McIntosh]'s improved trail in Trail Easement No. 1." CP 46. The existence of two separate easements must be highlighted because the Kaves' arguments with respect to RCW 4.24.630 essentially ignore damage the Kaves caused to Trail Easement No. 1.

With respect to Trail Easement No. 1, evidence was presented that Mr. Kave's activities "terribly disturbed" the trail by tearing up the ground. *See,* VRP 109:9-19. It is apparent from the jury's verdict that the jury believed Mr. Kave's acts damaging the trail were wrongful and damaged McIntosh. CP 2542. With respect to the Recreation Easement, evidence was presented that amenities in the area, which included a picnic shelter, belonged to McIntosh (CP 1396-1405 and VRP 102:10 – 105:1), the Kaves knew the amenities belonged to McIntosh (CP 35-51 and 235-238), some amenities that the Kaves removed were entirely within the easement (CP Ex. 17), the picnic shelter was partially in the easement (*Id.*), and McIntosh was damaged by the Kaves removing amenities (*see,* VRP 97:1–99:2). It is apparent from the jury's verdict that the jury believed Mr. Kave's acts in removing the amenities were wrongful and damaged McIntosh. CP 2540.

In the case of both easements, the Kaves argue that even though the jury found the Kaves went into the easements and wrongfully caused damages, the Kaves should not be liable under RCW 4.24.630 because the Kaves own the land that is burdened by the easement. However, the only case cited in Section IV.C. of Appellants' Brief, which is where the Kaves first make their argument, is *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 225 P.3d 492 (Div. 1 2010). *Clipse* is not a case where the

servient land owner caused damage to an easement—in fact, the word "easement" is never used in the *Clipse* decision. 154 Wn. App. 573.

The *Clipse* case does nothing more than expound upon the definition of the word "wrongfully" as used in RCW 4.24.630. 154 Wn. App. 573. *Clipse* holds that conduct is wrongful only if a plaintiff has reason to know that the plaintiff lacks authorization. 154 Wn. App. at 580. In this case, evidence was submitted that properly allowed the jury to determine that the Kaves had reason to know they lacked authorization to remove or destroy amenities and damage trails. (See, *e.g.,* VRP 102:10–105:1).

The question of whether a servient landowner goes "onto the land of another" when that landowner enters an easement overlaying his or her own land and wrongfully damages the easement, is discussed in *Colwell v. Etzell*, 119 Wn. App. 432, 81 P.3d 895 (Div. 3 2003). In *Colwell*, the dominant estate owner of an easement for ingress/egress and utilities brought suit against the servient estate owner—the dominant estate owner's claims included a demand for costs and fees pursuant to RCW 4.24.630. There, the servient estate owner performed work within the easement for purposes of addressing drainage issues that affected the servient estate owner's land. The servient estate owner's activities arguably impacted the dominant estate owner's use of the easement for a period of time while the

work was performed. The trial court found in favor of the dominant estate owner and the servient estate owner appealed. 119 Wn. App. 432.

Division Three reversed the trial court's decision. *Id.* In so doing, that Court noted, "[t]he owner of a servient estate has the right to use his land for any purpose not inconsistent with its ultimate use for reserved easement purposes." 119 Wn. App. at 439 (citing *Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (Div. 1 1990)). The *Colwell* Court reasoned, in that case, the servient estate owner's activities "were not inconsistent with the future use of the easement." 119 Wn. App. at 440.

It is important to note what the Court in *Colwell* did not say. The majority opinion did not say RCW 4.24.630 was inapplicable because the servient estate owner was on his own land. The Court found "there was no physical trespass in the present case," but instead of ending the analysis, the Court went on to analyze the effect of the servient owner's conduct on the dominant owner's use of the easement. 119 Wn. App. at 439-40.

An easement is an interest in land. *See, Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965). As stated in *Colwell*, the ultimate use of the land is reserved for the dominant estate owner where land is burdened by an easement. 119 Wn. App. at 439. However, a dominant estate owner can be

held to trespass on the servient estate, even when the dominant estate owner acts within the physical boundaries of the described easement, if the easement is misused. *See, e.g., Olympic Pipeline Co. v. Thoeny*, 124 Wn. App. 381, 393, 101 P.3d 430 (Div. 2 2004) (citations omitted). And a dominant estate owner can be held liable pursuant to RCW 4.24.630 if the dominant estate owner damages property on an easement belonging to the servient estate owner if such property does not unreasonably interfere with the use of the easement. *See, Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (Div. 3 2001). It logically follows that a servient estate owner can be held liable pursuant to RCW 4.24.630 for damaging an easement and/or property within an easement by intentional and unauthorized conduct that negatively impacts the purpose of the easement. To hold otherwise would incentivize servient estate owners to damage easements because without the threat of treble damages and attorneys' fees, there would likely be many cases where it would be worth the risk of single damages if a servient estate owner could block or impair the use of an easement the servient estate owner did not like.

The Kaves state that *Standing Rock*, *supra*, and *Colwell*, *supra*, "are the only two published cases" dealing with the application of RCW 4.24.630 to easements. Appellant's Opening Brief at 37:3-6. And to

McIntosh's knowledge, *Colwell* is the only such case discussing whether a servient estate owner can be liable pursuant to the statute in Washington. But other states have dealt with the issue of whether a servient estate owner can trespass on their own property by misusing an easement. In *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), the Colorado Supreme Court held that a servient estate owner may be said to have committed trespass by altering an easement and that such trespass could subject the servient estate owner to "actual and even punitive damages." 36 P.3d at 1234. In *Stanton v. Strong*, 40 A.3d 1013 (Me. 2012), the Supreme Judicial Court of Maine affirmed a trial court's finding in favor of a dominant estate owner on a claim that a servient estate owner trespassed by placing materials within an easement in an effort to curb the dominant estate owner's use of the easement. The Court in *Chicago Title Land Trust Co. v. JS II, LLC*, 977 N.E.2d 198, 218 (Ill. App. (1st) 2012), stated, "[i]n the context of easements, trespass occurs when there is a material interference with the right of the owner of the dominant estate to reasonable use of the easement." The Court in *Chicago Title Land Trust* expressly rejected the argument that, "a servient estate cannot be found to have trespassed against its own property." *Id.* That Court further explained,

> In the language of trespass, an owner of the dominant estate has the right of use of the easement to the exclusion of the owner of the servient estate when its intended or actual use unreasonably interferes with the dominant estate's use. It is in this sense that reasonable use by a dominant estate may be "exclusive" to the use of the easement by the owner of the servient estate. *Peoples Gas Light & Coke Co. v. Joel Kennedy Construction Corp.*, 357 Ill. App.3d 579, 583, 293 Ill. Dec. 941, 829 N.E.2d 866 (2005).

Chicago Title Land Trust, 977 N.E.2d at 219.

But not all courts are in agreement. For example, *Tittiger v. Johnson*, 303 N.W.2d 26 (Mich. App. 1981), held that an easement does not dispossess the servient estate owner of land and the servient landowner cannot trespass on land in his or her possession.

As noted above, the Kaves essentially asked for this issue to be decided by the jury based upon the evidence presented at trial. The Kaves then failed to preserve any error at trial with respect to jury instructions on the issue of whether a servient estate owner can trespass on their own property. This Court should decline to review this issue. But even if this issue is reviewed, the Trial Court's decisions should be affirmed. An easement is an interest in land, McIntosh possesses valid easements that burden the Kaves' land, and the Kaves' actions unreasonably interfered with McIntosh's interests. The Kaves had the right to use their burdened land in any manner that did not interfere with the purposes of the easements,

but trespasses occurred when the Kaves damaged or blocked community recreation trails and removed or destroyed personal property, thereby interfering with McIntosh's rights.

D. The Trial Court did not abuse its discretion in prohibiting the Kaves from presenting the jury with evidence solely concerning the Kaves' previously dismissed RCW 4.24.630 claim.

It cannot be stated enough times that the Kaves have failed to assign error to any decision by the Trial Court as to the dismissal of the Kaves' claims. For purposes of the Kaves' alleged RCW 4.24.630 claim, the relevant Orders from the summary judgment hearings in this case are as follows in chronological order:

- In April 2014, some of the Kaves' alleged RCW 4.24.630 claims were dismissed pursuant to the statute of limitations (CP 587-590);
- In February 2015, the Trial Court dismissed the Kaves' claims for timber trespass—it can be gleaned from the Order that the Kaves commingled timber trespass and waste claims even though two separate statutes deal with those distinct claims (CP 1255-1261);
- In October 2015, McIntosh's "Motion for Partial Summary Judgment re: Waste Damages" was granted—the Trial Court's Order expressly stated the finding that there was "no monetary property damage or injury to [the Kaves' land]." However, the

Court "reserve[d] a ruling on th[e] limited issue...[on] the possible exception of...alleged timber removal." (CP 1911-1914).

Collectively, the summary judgment Orders identified above dismissed the Kaves' claims for alleged wetlands damages—except for potentially a small amount related to alleged timber removal. McIntosh brought up this fact in a Motion in Limine seeking to prevent the Kaves from presenting evidence during trial related to damage claims that had been dismissed by the Trial Court (*e.g.,* fees for wetlands experts). *See,* CP 2016-2025. The Court provisionally granted McIntosh's Motion in Limine, but allowed the parties to submit additional briefing "on why large amounts of wetland related costs are or are not available as damages when wetlands claims have all been dismissed." CP 2248-2254. McIntosh filed additional briefing, which was supported by *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (Div. 2 2015). CP 2278-2284. The Kaves also filed an additional brief and argued that *Gunn v. Riely*, *supra*, does not apply. CP 2285-2289.

With respect to the Kaves' brief on *Gunn v. Riely*, the Trial Court noted that it was a brief "for the Court of Appeals." VRP 7:21-25. The Court entered an Order on January 25, 2016, confirming that the Kaves are not entitled to recovery of any costs or fees they have incurred in this litigation. CP 2290-2291. And here again, while the Kaves may have

sought review of numerous Orders by identifying them in a Notice of Appeal, the Kaves failed to assign error to most of those Orders—including the Trial Court's January 25, 2016, Order.

Attaching multiple Orders to a Notice of Appeal does not cut it—to preserve an issue for appeal, an appellant's opening brief should include, "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). "An appellate court will not consider a claim of error that a party fails to support with legal argument in [an] opening brief." *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487 (Div. 1 2015) (citations omitted).

Appellants' Opening Brief fails to mention *Gunn v. Riely, supra.* In *Gunn*, there was no evidence or damages awarded beyond the value of trees. 185 Wn. App. at 527. The Court held in such an instance that, "[t]he damage fits squarely within the bounds of the timber trespass statute. Thus, the timber trespass statute provides liability for damages...and precludes application of the waste statute [RCW 4.24.630]." *Id.*

In this case, the Trial Court determined there had been no injury to the Kaves' land. The Kaves' only potential damage was related to a small amount of timber. Pursuant to the holding in *Gunn*, RCW 4.24.630 does

not apply to the Kaves' claim(s) since the Kaves' only evidence of property damage is related to timber. And since the Trial Court additionally dismissed the Kaves' timber trespass claim, a decision the Kaves do not assign error, the Kaves did not have any damages claims remaining.

The Kaves argue the Trial Court's decision preventing the Kaves from presenting RCW 4.24.630 damages evidence at trial should be reviewed on an abuse of discretion standard. McIntosh does not challenge the Kaves' theory on this standard of review. The Kaves cite *Medcalf v. Dep't of Licensing*, 83 Wn. App. 8, 16, 920 P.2d 228 (Div. 2 1996), which is a case that held a Trial Court's exclusion of evidence was not an abuse of discretion. In so holding, the Court in *Medcalf* noted, "[a] trial court abuses its discretion only when its ruling was based upon untenable grounds or untenable reasons. We will revise a trial court's ruling only if no reasonable person could have so ruled." *Medcalf*, 83 Wn. App. at 16 (citations omitted).

Based on the summary judgment Orders to which the Kaves fail to assign error and based on *Gunn v. Riely*, which the Kaves fail to address on appeal, the Trial Court made the correct decision. There was no abuse of discretion. And per *Jackson*, *supra*, the Kaves may not argue for the first time on appeal in their Reply that *Gunn* does not apply or that summary

judgment Orders dismissing the Kaves' claims should be reversed.

E. The Trial Court ruled correctly on the Kaves' CR 50 Motion regarding the statute of limitations. And the Trial Court did not abuse its discretion in declining to give a jury instruction on the statute of limitations where the Kaves failed to propose such an instruction.

McIntosh had an easement staking survey performed in October 2010. *See,* Ex. 17. At the time of the survey, a picnic shelter/gazebo was present that was at least partially within the legally described boundary of the Community Recreation Easement. *See,* Ex. 17; and VRP 256:4-8; 84:23–85:5, 150:4-14, and 166:6–167:2. The structure and other amenities (*e.g.,* flag pole) were property of McIntosh. CP 1916-1917.

Evidence was presented that Mr. Kave damaged the picnic shelter and then, the day after the easement staking, completely disassembled and removed the picnic shelter. *See,* VRP 173:5–174:15 and 94:19–95:21. When Mr. Kave testified, he provided a motive for why he damaged and/or removed McIntosh's amenities—he wanted to build a shop near the Recreation Easement and wanted the driveway for his shop to pass along "just to the back side" of where McIntosh's picnic shelter was located. VRP 371:20–373:6. McIntosh's counterclaims were filed less than three years from the date that Mr. Kave removed the picnic shelter. CP 35-51.

McIntosh obtained an estimate to replace the picnic shelter that Mr. Kave removed and was told the price would be $9,500.00 not including costs to ensure foundational support for the structure. VRP 97:1–99:13. McIntosh also obtained estimates for other amenities such as picnic tables and log benches; the estimate was $2,500.00 for the log benches and $900.00 per picnic table. *Id.* Many of these amenities had been removed or destroyed by Mr. Kave over the years. *See,* VRP 85:2-8. The jury awarded McIntosh a total of $13,500.00 for damage to personal property and conversion, $1,000.00 for damage to land (*e.g.,* destruction of portions of the trail easement), and $9,500.00 for nuisance. CP 2540-2543. Based on the evidence that replacing the picnic shelter alone would cost $9,500.00 plus costs to prepare the ground and install a foundation, it was reasonable for the jury to award $13,500.00.

Even assuming for argument's sake that the jury did award $4,000.00 for picnic tables and benches despite the fact that estimates for those items do not equal $4,000.00, the Kaves argue the potential $4,000.00 overcharge should have been addressed by a jury instruction on the statute of limitations. However, the Kaves failed to present a jury instruction to the Court. *See,* CP 1999-2015. Moreover, the Kaves specifically refused the Trial Court's express demand that the Kaves present an instruction for

consideration. *See,* VRP 409:10-15, 510:21–513:4, and 528:7–530:4.

As stated in Section IV.A.4. above, an appellate court should not consider an alleged error in failing to give an instruction if the party claiming error did not propose such an instruction. *See, State v. Strandy, supra*; *Kemp v. Leonard, supra.* When a decision not to give an instruction is based in part on the dilatory conduct of the party requesting such instruction, the decision should be reviewed under an abuse of discretion standard. The jury could have been confused by an ill-considered statute of limitations instruction in this case. For example, the breach of EC&R counterclaim, which was supported by many of the same facts that supported other counterclaims, is subject to a six-year statute of limitations. RCW 4.16.040. Giving a statute of limitations instruction on three-year claims, but ignoring the six-year statute on another claim, may have confused the jury. Under the circumstances, it was not an abuse of discretion to pass on giving an instruction about the statute of limitations.

Further, the jury instruction phase was not the first time the Kaves failed to properly argue their statute of limitations theory. For example, the Kaves failed to timely assert this argument on summary judgment despite numerous opportunities to do so—the Kaves attempted to argue this theory at one point during oral argument on a motion, but the Trial Court refused

to consider the issue since it had not been briefed. *See,* CP 2071-2072.

In a civil case, the statute of limitations will be deemed waived if not raised in the trial court. *Vigil v. Spokane County*, 42 Wn. App. 796, 714 P.2d 692 (Div. 3 1986). The only time the Kaves properly brought up the statute of limitations defense was on their CR 50 motion. The Trial Court denied that motion in part, and it was appropriate to do so as the facts in evidence proved the picnic shelter had been removed less than three years after McIntosh's counterclaims were filed. VRP 192:17–193:16.

The Kaves baldly assert that, "[d]enial of [the Kaves' CR 50] motion was an error." Appellants' Opening Brief at 29:12. However, the Kaves make absolutely no argument explaining how it was error given that the facts undisputedly show McIntosh's counterclaim was filed less than three years after Mr. Kave removed the picnic shelter. "Assignments of error lacking argument or citation to authority will not be considered on appeal unless it is apparent, without further research, that they are well taken." *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 398, 739 P.2d 717 (Div. 1 1987) (citation omitted).

The Kaves argument appears to be only that the Trial Court should have instructed the jury on the statute of limitations and/or instructed the jury that picnic tables were not recoverable damages. As previously stated,

the Kaves did not submit a jury instruction and the Trial Court had discretion not to give an instruction since no specific instruction was proposed. At all rates, there is no evidence that the failure to give such an instruction prejudiced the Kaves as the verdict returned by the jury is reasonable based on the evidence presented at trial.

F. The Kaves failed to preserve error with respect to nuisance. There was no error. And there is no evidence the outcome of trial was affected by the claimed error.

At no time did the Kaves propose a jury instruction arguing that a potential exemption for forest practices should have applied to McIntosh's nuisance claim. *See,* CP1999-2015 and 2520-2539. The Kaves never mentioned that they wanted an instruction about a potential exemption for forest practices when nuisance was discussed in the context of preparing the final jury instructions. VRP 411:25–415:16 and 493:5–500:21.

"[F]ailure to object to jury instructions waives the issue on appeal." *Hudson v. United Parcel Service, Inc.*, 163 Wn. App. 254, 269, 258 P.3d 87 (Div. 2 2011) (citing *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978)). "Instructions to which no exceptions are taken become the law of the case." *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001). If the Kaves wanted some different instruction on nuisance and/or a separate instruction on a

potential exemption for forest practices, the Kaves should have made their pitch during trial. They failed to do so. Consequently, the Trial Court's instructions on nuisance became the law of the case and it is too late for the Kaves to complain now; "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

Additionally, Appellants' Opening Brief lacks any citation to evidence that the Kaves' obstructionist, destructive, and nuisance activities were forest practices that might somehow fall under a potential forest practices exemption. The only evidence the Kaves cite at all on this issue is testimony from the Kaves' forester that the Kaves were in compliance with a forest management plan. Appellants' Brief at 33:4-6. But the Kaves' alleged compliance with a forest management plan does not automatically mean the Kaves' actions were either: (1) not nuisances; or (2) exempt nuisances. Wood piles and heavy machinery may indeed be common where forest practices are in progress, but there is no testimony by the Kaves' forester that the Kaves had to put wood piles and equipment in unsightly places, including in or near known recreation easement areas. Moreover, the evidence of the Kaves' nuisances went beyond what might arguably be considered forest practices. Deliberately destroying or removing someone else's personal property is not a legitimate forest practice. *See, e.g.,* CP

95:1-9. Blocking the use of community recreation trails for more than a year is not a legitimate forest practice. VRP 132:24–134:7 and 373:7–378:8. The Kaves' refusal to cooperate with McIntosh to remove dangerous trees and overhanging limbs from the vicinity of community trails is not a legitimate forest practice. *Id.* and VRP 454:3–457:15.

The Kaves' deliberate, knowing, and systematic abuse of the recreation easements and the improvements located within them is mainly what constitutes a nuisance. There was ample evidence presented at trial regarding the Kaves destruction and/or removal of property over the years from the Community Recreation Easement, destruction and obstruction of Trail Easement No. 1, and general poor and threatening attitude about McIntosh members using the easements burdening the Kaves' property. VRP 95:1-9, 132:24–134:7, 373:7–378:8, and 454:3–457:15. The evidence proved that the Kaves' unreasonable conduct and self-absorbed views caused the situation that led to McIntosh's counterclaims—allegedly legal forest practices were not the central issue.

In the final analysis, the Kaves failed to preserve any issue for appeal with respect to jury instructions on nuisance. This Court should not consider the issue at all. But even if this Court were to consider the issue, the Trial Court's instruction should be affirmed as it was not an abuse of

discretion to leave out wording related to a potential forest practices exemption for which there was no evidence.

G. The Kaves failed to preserve error with respect to McIntosh's RCW 4.24.630 counterclaim. And there was no error.

The Kaves argue that RCW 4.24.630 does not apply to landowners with easements that burden their land as long as the landowner's wrongful acts are done on a portion of the easement overlaying the landowner's servient estate. As explained above in Section IV.C. of this Respondent's Brief, the Kaves' argument is incorrect.

In any event, the Kaves' argument is moot in the context of assigned error to jury instructions because the Kaves waived their right to appeal this issue by not objecting to it at trial. *See,* VRP 407:4–408:19 and 509:16–513:4. When the Trial Court addressed the jury instruction stating on RCW 4.24.630 and asked the Kaves' counsel, "is there any objection or exception?" the Kaves' counsel stated, "No objection." VRP 510:2-4.

H. As the parties consistently agreed to at the Trial Court level, the EC&Rs provide a basis to award McIntosh its fees in this case.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *see also*, *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992); and *see, Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 814 P.2d 243

(Div. 1 1991). The Kaves failed to argue at trial that McIntosh was not entitled to recover fees pursuant to the language of the EC&Rs. *See, e.g.,* CP 2718-2725. This is likely because the Kaves took the opposite view at trial—they agreed with McIntosh that the EC&Rs did provide for an award of fees. VRP 8:9–11:7. The Kaves were even so bold as to request fees pursuant to the EC&Rs post-trial based on the completely untenable argument that they had prevailed on a waste claim that was tied to the EC&Rs. CP 3005-3013.

"[A] man shall not be permitted to deny what he has once solemnly acknowledged." *Harmon v. Hale*, 1 Wash. Terr. 422, 425, 34 Am. Rep. 816 (1874) (citing *Sprigg v. Bank of Mt. Pleasant*, 39 U.S. 201, 10 L.Ed. 419 (1840)). Judicial estoppel applies if a litigant's prior inconsistent position benefited the litigant or was accepted by the court. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230, 108 P.3d 147 (Div. 1 2005) (citing *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (Div. 3 2001)). The Court accepted the parties' joint representations that the EC&Rs were a basis to award fees to the party that prevailed on McIntosh's breach of EC&Rs claim against the Kaves. The Kaves must not be permitted to argue for the first time on appeal that fees are improper under the EC&Rs just because the Kaves failed to prevail at trial.

I. The Trial Court did not abuse its discretion in awarding McIntosh the fees it requested.

As stated in Section IV.A.7. above, a Trial Court's award of fees is reviewed for abuse of discretion. *Collins*, *supra*. In this case, the Trial Court's Order awarding fees contained findings of fact, including: "The Kaves have acknowledged that the EC&Rs has a fee provision"; "The jury also found that the Kaves breached the applicable EC&Rs"; "McIntosh's counterclaims included multiple claims that were largely intertwined at the core"; and "The time and labor required in this case was substantial, but reasonable and necessary in light of the length of the case, the legal questions involved, and the conduct of the Kaves." CP 3082-3087.

The Trial Court's award for fees was based on the appropriate legal considerations, which were briefed for the Trial Court and were reflected in the Order awarding fees. *See,* CP 2570-2580, 2726-2732, and 3082-3087. For example, "[w]hen a plaintiff's claim for relief involves a common core of facts and related legal theories, there is no precise rule or formula for taking into account the degree of success in a fee award." *Brand v. Dep't of Labor & Indus.*, 91 Wn. App. 280, 292, 959 P.2d 133 (Div. 2 1998).

The Kaves argue that McIntosh and/or the Trial Court should examine each time entry and determine if the work described was for a claim on which McIntosh prevailed and included a basis for which to be

awarded fees. The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (Div. 1 1995).

Here, McIntosh prevailed on the EC&R claim, which is a basis to award fees, and which claim is intertwined at its core with virtually every other claim. The fact McIntosh prevailed in proving its EC&R counterclaim against the Kaves and defending the Kaves' EC&R claim against McIntosh is not an issue that is being appealed. McIntosh also prevailed on its RCW 4.24.630 counterclaim, which is another basis to award fees.

McIntosh's attorneys were forced to spend time examining various allegations by the Kaves, which included the Kaves claiming damages related to alleged wetlands violations. Work performed in analyzing alleged wetlands issues, for example, was beneficial and put to use in defending and prosecuting EC&R claims. The Trial Court was presented with McIntosh's billing statements, was aware of the issues McIntosh prevailed on, was aware of the issues McIntosh did not prevail on, and was aware of which issues allowed for an award of fees. With all of that in mind, the Trial Court awarded McIntosh all of the fees requested. The Trial Court had discretion to make that award and there was no abuse of discretion upon

which that award should be reversed and/or remanded for further analysis.

J. The Trial Court's decisions should be affirmed on appeal.

For all of the foregoing reasons, McIntosh denies that the Trial Court erred. McIntosh further denies the Kaves have properly preserved and/or argued alleged errors on appeal. The jury's verdict should be left intact and the Trial Court's Orders and decisions should be affirmed, including the judgment that was entered against the Kaves.

K. McIntosh is entitled to fees on appeal. The Kaves are not.

McIntosh requests to be awarded its fees on appeal pursuant to RAP 18.1, RCW 4.24.630(1), and the EC&Rs. "If a statute allows an award of attorney fees by the trial court, the statute is normally interpreted as allowing an award of attorney fees to the prevailing party on appeal as well." 14A Wash. Prac., Civil Procedure §37.21 (2d ed.) (citing *Besel v. Viking Ins. Co. of Wisconsin*, 105 Wn. App. 463, 21 P.3d 293 (Div. 3 2001); *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 953 P.2d 1150 (1998); other citations omitted). RCW 4.24.630(1) provides for fees to a claimant who prevails at trial. And the parties agreed that the EC&Rs provide for fees.

RCW 4.24.630(1) does not allow fees to a party who defends a claim brought pursuant to the statute. The Kaves argue on appeal that they should

be awarded fees if McIntosh's judgment is reversed. The Kaves fail to cite any support for this argument.

With respect to the EC&Rs, the Kaves did not assign error to the jury's finding that the Kaves breached the EC&Rs. Further, the Kaves did not assign error to the Trial Court's dismissal of the Kaves' breach of EC&R claims on summary judgment. There is no mechanism at this point for the Kaves to prevail on EC&R claims. In this case, McIntosh successfully defended against the Kaves' EC&R claims and McIntosh prevailed on its EC&R claims against the Kaves—these determinations cannot be reversed.

There is no statute, contract, or equitable grounds providing for the Kaves to be awarded fees on appeal at this time. The only way the Kaves could be awarded fees is if this Court granted the Kaves' request to remand the issue of the Kaves' RCW 4.24.630 claims for a new trial and the Kaves prevailed on that issue in the new trial—and in that unlikely event, the Kaves could be awarded fees by the Trial Court. Only McIntosh can be awarded fees on appeal. It is appropriate to award McIntosh fees on appeal based on RCW 4.24.630(1). And it is appropriate to award McIntosh fees on appeal based on McIntosh having to respond to the Kaves' EC&R argument even though the Kaves' trial counsel stipulated that the EC&Rs were a basis upon which fees must be awarded.

V. CONCLUSION

For the foregoing reasons, McIntosh requests that the Court of Appeals affirm all Orders and rulings of the Trial Court. McIntosh further requests an award of fees on appeal.

RESPECTFULLY SUBMITTED this 29th day of September 2016.

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PROOF OF SERVICE

I certify that I caused to be served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of September, 2016, at Olympia, Washington.

Pamela R. Armagost